UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

UNIVERSAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Appellant,

vs.

FRANK NOEL,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Appellant's Brief

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STATEMENT OF THE CASE

This case arises out of a curious accident resulting in the damage of three large automobile trucks which had been used in road building in the mountainous "John Day" country in Eastern Oregon. Appellant corporation had issued an insurance policy on each of the trucks and the controversy arises out of the construction of the provisions of the policy with reference to towing. The Appellee is the owner of the claim by assignment from his son, John Noel.

In the summer of 1930, John Noel had a sub-contract under which he used the three trucks in question, on a road building job in a remote section of Eastern Oregon widely known as the "John Day country." (Transcript, pp. 53-56-58.) They had been purchased at various times and were 1926 and 1927 model 52 White Trucks. They had been used on rock and dirt hauling in connection with road building in 1927 to 1930. (Trans. p. 52.) The work closed in Oregon on November 18th, 1930, when one J. R. Hickey, an employee of John Noel, packed them alongside the camp and raised the beds and jacked up the trucks to protect same from damage from the deep snow. (Trans. p. 56.) The trucks remained in this place until the early part of June, 1931, when the owner and his employes went from Yakima into Oregon to bring the trucks and a so-called "steam-shovel" out of that country. (Trans. p. 53.)

Insurance policies were issued on behalf of Appellant on these trucks as of the date of June 1, 1931. All policies are of the same form and the original policies are attached to the transcript and marked Exhibits "A," "B" and "C."

The work of bringing out the equipment above described started about June 16th to 18th, 1931. On

June 26th occurred the events resulting in this case.

The trucks were equipped with hooks in front and rear to which cables or chains might be attached for pulling or towing. They were also equipped with beds for hauling rock, dirt or gravel which was their usual and intended use. (Trans. pp. 52-53.)

In bringing out the equipment under the personal direction of John Noel it had been part of the procedure on slippery or narrow places to fasten the trucks together with cables and chains and these in turn were fastened to the "steam-shovel." While each truck and the shovel moved under its own power, the shovel had been slipping when they were bringing it out as there had been a good deal of rain. (Trans. p. 67.) It was found necessary to have the trucks hooked on ahead to help in case anything happened. The trucks had not actually pulled the shovel. The trucks were cabled together for trouble and to use precaution for moving up the big hill. They were trying safety first. It was a narrow road and if one truck went down a little then the other trucks would have held it on. If the shovel slipped down over the bank they expected to hold it and if one truck slipped down one side would expect the other trucks to hold it. There had been some trouble with the gears slipping

in the shovel a few days before at which time some new links had been put in. (Testimony of John Noel, Trans. pp. 65-66-67.)

With the shovel in this condition the equipment started on June 26th to climb a long, steep hill. The road was narrow and on a steep grade rising at the rate of 2,000 feet in five miles of continuous grade. It was built upon the side of a mountain and was probably ten feet wide with the outer edge cleared up where rocks were filled in. (Trans. pp. 60-61.)

Mr. Noel testified that prior to the accident the trucks were fastened together with chains or cables. The lead truck was fastened to the second truck with a long twisted cable. The front and rear trucks hooked up were 30 to 40 feet apart. These trucks had hooks at each end for towing. They are put in front and rear for pulling when one truck is stuck. They had a cable between the first and second truck when we started out that morning and a big chain between the second and third trucks was fastened to the trucks by means of hooks. And between the third truck and shovel he had a big heavy log chain. And when they started up the grade that morning the equipment was fastened together in the manner just described and they continued to have them fastened together in that

manner until they got to the place where they had difficulty in getting around a rocky corner and stopped, near the place where the upset occurred. (Trans. pp. 64-65.)

In going around this rocky corner a rod had become bent. At the same time magneto trouble developed in the motor of the front truck. During all this time the motors on the other two trucks and on the shovel were left running.

Besides the owner, John Noel, there were five employes with the outfit, to-wit, three truck drivers, the shovel-runner and the oiler. (Trans. pp. 58-59-60-70-71.) There was also present C. A. Case, a driver for the Shell Oil Co., who was watching the efforts to move the equipment around the corner. (Trans. p. 58.)

After thus working on the machines for a time some of the men were sent back for repairs. The shovel-runner and Mr. Case went back to Case's truck, which was not in sight of the equipment. Noel walked up the hill a few hundred feet, also out of sight of the trucks. One man was working on the front truck magneto. Noel was gone five or six minutes and when he walked back down the road the whole outfit had gone over the bank. (Trans. pp. 65-66-67.)

Aside from the evidence of C. A. Case (Trans. p. 58) the only evidence of what happened is contained in Mr. Noel's testimony quoted above at length and that of Joe Brinier. (Trans. pp. 70-71-72.)

From the evidence it appears that at the time the three trucks and the shovel went over the brink the cable between the first and second trucks had come unfastened and that the shovel was unhooked from the third truck. (Trans. pp. 65-69-72-73.) The witness Case says, however, that the shovel was chained to the last truck when he left the scene to go back to his truck. (Trans. p. 64.) And it further appears that the second and third trucks were still fastened together by a big heavy log chain. (Trans. p. 65, line 6.)

The remains of the trucks were left at the bottom of the canyon and suit was commenced for the recovery of the face value of the policies $4,000 each.

Under the term "Exclusions," each policy provides (Exhibits "A," "B" and "C"):

> "F. Unless otherwise provided by agreement in writing added hereto, the Company shall not be liable:
>
> * * *
>
> (2) Under Section 2, nor under item 4 of Section 1 of the Schedule of Perils, for any loss, damage or expense while the automobile insured hereunder is operated, maintained or used * * *

or (c) for towing or propelling any trailer or vehicle (incidental assistance to a stranded automobile on the road is permitted)."

Appellant by its first affirmative defense, (Trans. p. 16) alleged that no agreement permitting towing was ever made and that the damage, if any, was caused by the towing of the trucks and shovel in violation of the foregoing exclusion. (Trans. pp. 17-18.)

Upon the foregoing facts the trial court upon motion refused to submit the question of towing to the jury upon which Appellant properly noted an exception.

The jury returned a verdict of $7,500.00 for the three trucks.

SPECIFICATION OF ERRORS

(1) The court erred in granting Appellee's Motion at the conclusion of all the evidence in the case to withdraw from the consideration of the jury the evidence offered in support of appellant's first affirmative defense, to-wit: that the trucks and shovel were being towed within the provisions and meaning of the insurance policies admitted as evidence in the case and marked Exhibits "A," "B," and "C."

ARGUMENT

It is Appellant's contention that the facts as set forth above disclose that the insured trucks at the time of the loss were engaged in towing, and that therefore the loss is excluded by the policy provision above set forth.

The purpose of fastening the trucks to each other and the third truck to the shovel was that each might aid the other and aid in the event of possible mishap. The purpose was not solely to pull the shovel, but in the event any one of the vehicles went off that the others might aid it. As Noel testified "for trouble and to use precaution for moving up the big hill." "Were trying safety first." "It was a narrow road and if one truck went down a little, then the other trucks would have held it on." "If the shovel slipped down over the bank, they expected to hold it and if one truck slipped down one side * * * would expect the other trucks to hold it." (Witness Noel, Trans. p. 65.)

The trucks are clearly within the policy exclusion which covers "trailers," or "vehicles." That the shovel was a vehicle within the meaning of the policy, there can be no doubt. It was the familiar shovel boom and engine mounted upon a caterpillar tractor.

The word "vehicle" is defined in Washington as follows:

> (a) Vehicle—"Every device in, upon or by which any person or property is, or may be transported or drawn upon a public highway, excepting devices moved by muscular power or used exclusively upon stationary rails or tracks." Washington Session Laws 1929, Chapter 180, Section 1 (a).

In Oregon:

> "5. The term 'vehicle' shall mean every mechanical device moved by any other power than human power over the highways of the State, excepting only such as moves exclusively on stationary rail tracks." 55-101 Oregon Annotated Code.

The policy was written in Washington; the loss occurred in Oregon. The statutory definition of vehicle in each state clearly covers the device herein called "shovel" or "steam-shovel."

At the trial, the Appellee contended that inasmuch as the evidence disclosed that each vehicle was operating under its own power and that they were chained and cabled together, simply in case of an emergency, there was no towing. The trial court took this position when it granted the Motion taking the case from the jury.

It is to be observed that the policy provision in this case excludes coverage while the insured vehicle is "operated, maintained, or used" * * * "for towing or propelling any trailer or vehicle." Under this language, it is not necessary that the trucks be actually engaged in pulling another vehicle at the time of the loss. The word "maintained" is defined as follows in Webster's New International Dictionary:

> "To hold or keep in any partciular state or condition, especially in a state of efficiency or validity."

The court's ruling in effect restricts the force of this provision to cases where vehicles are actually moving and pulling another vehicle. This is an unwarranted restriction of the meaning of the language used in the policy. If there is a hazard in connection with towing, and the cases hereinafter cited all agree that there is, why is that hazard not present under the facts in this case?

Here we have four vehicles proceeding up a steep mountain grade, chained and cabled together. When the owner and his employees left the vehicles in question standing on the steep, narrow grade, the motor of the shovel and the motors of at least two of the trucks were left running. (Witness Case, Trans. p. 60; Witness Noel, Trans. p. 67.) Those vehicles so

chained together are each made dependent on the vagaries of the other. This is a risk which is not an ordinary incident to the operation of a truck, and is clearly contemplated in the policy provision. While no one is able to explain just what happened, it is a fair inference that the running motors, left as they were, constituted prime factors in causing the whole outfit to go over the edge and down the mountainside. The hazard was just as great then and there as if the vehicles were actually in motion. To accede to Appellee's contention means that we have a situation where the policies are in force one instant when the cables are slack and the next instant coverage is excluded because the cables and chains are taut. This use of the truck was not usual or customary, and the very recital of the reasons why the cables and chains were used shows the extreme increase in hazard to which the trucks were subjected.

So far as a diligent search discloses, precedents covering the situation are few. In all of the cases where the question has been presented, however, the court has given full effect to this provision, and has held that the loss need not have been the proximate result of the act of towing.

Coolidge v. Standard Accident Insurance Co., ... Cal. App. ....., 300 Pac. 885;

Conner v. Union Automobile Insurance Co., ... Cal. App. ....., 9 Pac. (2d) 863;

Maryland Casualty Co. v. Adams (Miss.) 131 Southern Reporter 544;

Adams v. Maryland Casualty Co. (Miss.) 139 Southern Reporter 453.

In the *Coolidge* case, supra, it was claimed this exemption clause was waived by failure to plead in the answer of the Insurance Company that the presence of the attached trailer contributed to the cause of the accident. The court said:

> "It was not necessary to make these allegations. The defendant's exemption from liability does not depend upon the attached trailer becoming the cause of the accident or even contributing to the casualty. The very fact that the trailer was being towed at the time of the accident relieved the defendant from liability according to the specific terms of the insurance policy. The Company was entitled to protect itself against this added hazard. The unambiguous terms of the policy did exempt the Company from liability while the automobile was towing a trailer."

It is manifest that if the casualty feared by Mr. Noel has occurred viz. If one of the trucks had slipped off the road while the cavalcade was moving, the exemption would have applied, within the doctrine of the *Coolidge* case.

In the case of *Conner v. Union Automobile Insurance Co., supra,* the court said:

> "The attachment of a trailer to the automobile while it was being operated is clearly an added hazard. There appears to be good reason why an insurance company may lawfully limit its liability to the operation of the insured machine free from the use of an attached trailer, which increases the hazard. An automobile is not ordinarily used with a trailer. It is reasonable to expect the owner of a machine, who desires to obtain insurance for his automobile with a trailer attached, to so inform the insurer."

In the case of *Maryland Casualty Company v. Adams, supra,* the complaint alleged that one Falls, the insured under the policy, was driving his truck with a trailer attached; that he traveled onto the wrong side of the road, and the front end of his truck struck the car which was being cranked by the injured Adams. The trial court overruled a demurrer to the complaint. It was contended in that case that the act of towing a trailer had no proximate connection with the injury, but this contention was overruled and the demurrer was sustained upon the grounds that the towing exclusion was perfectly valid and it was apparent that the operation of a truck with a trailer attached containing logs was more hazardous than the operation of the truck without the trailer attached. The latter portion of the Opinion seems to indicate at least by implication that the court is applying the test that the act of towing must be a proximate cause of

the injury. In the subsequent case of *Adams v. Maryland Casualty Co., supra,* an action brought on behalf of the minor son of the injured in the case just discussed, the complaint was amended to allege that the trailer was not loaded with logs, and that the truck was being operated with sufficient speed to knock the car in which the plaintiff was riding off the road without creating any slack between the trailer and truck. The court held, however, that these amendments made no difference and that the demurrer should be sustained. In the course of its opinion, the court said:

> "It will be seen from an analysis of the provisions of the policy that the Insurance Company did not assume to insure the risk caused by the operation of the truck with the trailer attached, unless it was permitted by notation on the policy, and the proper charges made for such coverage.
>
> We do not see how the averments set forth in this declaration aid the plaintiff in the suit because the Casualty Company did not assume to insure against injuries in the operation of the truck with the trailer attached."

The language of the court in the latter case seems to indicate clearly that it is the act of attaching a trailer, or other vehicle, which is intended to be excluded by the Insurer.

The contention that each vehicle was operating under its own power is beside the point. The test is as

applied by the court in the cases above—it is the operation of a vehicle with another vehicle attached which is excluded, and the striking manner of the loss in this case demonstrates that the exclusion was reasonable. Under the facts of this most unusual accident, Appellant earnestly contends that the question of whether the trucks were "operated, maintained or used" for towing, was a question of fact and the court erred in not submitting it to the jury. That for this reason the case should be reversed and Appellant granted a new trial.

Respectfully submitted,

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